REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 13 'b' OF 2015

SAMWEL OJUNG'A MUN'GAYA …................................APPELLANT

VERSUS

REPUBLIC …..RESPONDENT

[Appeal from Original Conviction and Sentence from Maseno PM'S Court by: B OCHIENG – Ag SPM

in Criminal Case NO. 207 OF 2015.]

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JUDGMENT

The appellant **Samwel Ojung'a Mung'aya** was charged with the Offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code. He faced an alternative charge of handling stolen property Contrary to Section 322(2) of the Penal Code. He was convicted of the offence of Robbery with Violence on his own plea of guilty and was sentenced to suffer death as by law prescribed.

The appellant has now appealed against the conviction and sentence. In his petition of appeal he raised two major grounds of appeal as follows:

a. **That the trial magistrate erred in law and facts by not allowing him to consult any law experts or advocate so as to make the right decision on the plea.**
b. **That the sentence imposed on him is manifestly harsh and excessive as to amount to a misdirection.**

The appellant made oral submissions. He stated that he was not able to understand the charges read out to him and neither did he understand the gravity of the offence that he was charged with and that is why he admitted to having committed the offence. He urged Court to order that fresh plea be taken.

The appeal was opposed by the state. Ms. Muchoki, the learned state counsel submitted that the appellant's plea was unequivocal; that the court entered the guilty plea after explaining the particulars of the charge to the appellant; and, that the appellant confirmed that the facts read to him were true. Counsel submitted further that the appellant's argument that he did not know the consequences of pleading guilty cannot stand as ignorance of the law is not a defense.

This being a first appeal, the court has a duty to reconsider and re-evaluate the evidence afresh with a view to reaching its independent conclusion. see. **OKENO VS.- REPUBLIC[1972] E.A 32**. In the present appeal however the appellant was convicted on his own plea of guilty and thus full trial was

not conducted. What the Court should therefore ascertain is whether the plea was unequivocal before determining the other grounds of appeal.

Section 281 of the Criminal Procedure Code provides that an accused person may plead not guilty, or guilty subject to a plea bargain. The principles to be applied in plea taking were well laid out in the locus classicus of **ADAN VS.- REPUBLIC [1973] EA 445** at **446** where the Court held thus:

> **"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the**
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> **facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."**

In the case of **NJUKI VS.- REPUBLIC [1990] KLR 334** the Court emphasised the need to caution in recording a guilty plea. It held that the Court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally.

In this matter, the proceedings in the lower court show that the charges were read and explained to the appellant in Kiswahili and he stated : "It is true". The court again read the charges and the particulars thereof and explained the same to the accused in Kiswahili and the accused replied in Kiswahili: "**I understand the charges and the charges are true".** The prosecutor read the facts and he confirmed the same stating: **"The facts are true and I understand them".** The learned magistrate then proceeded to convict the appellant. To that extent the right procedure was followed. The appellant had a chance to change his plea when the charge was re-read to him but he did not, He instead stated that he understood the charges and that they were true. However, on the same ground, the appellant attributed his decision to plead guilty to lack of legal representation. He stated that he was not allowed legal representation during plea taking, thus his decision was misinformed.

Article 50 of the Constitution provides for legal representation. It provides as follows:

> ***(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or , if appropriate, another independent and impartial tribunal or body.***
>
> ***(2) Every accused person has the right to a fair trial, which includes the right-***
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> ***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;***
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> ***(h) to have an advocate assigned to the accused person by the state and at State expense, if substantial injustice would otherwise result and to be informed of this right promptly…"***

The Court of appeal sitting at Malindi in **KARISA CHENGO, JEFFERSON KALAMA KENGHA & KITSAO CHARO NGATI V REPUBLIC [2015] eKLR** while dealing the issue of legal representation quoted the case of **DAVID MACHARIA NJOROGE V REPUBLIC (2011) EKLR** where the court held as follows:

“State funded legal representation is a right in certain instances. Article 50(1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result. Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2(6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

We are of the considered view that in addition to situations where ‘substantial injustice would otherwise result.’ persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.”

However the Court of Appeal in **KARISA CHENGO, JEFFERSON KALAMA KENGHA & KITSAO CHARO NGATI V REPUBLIC (SUPRA)** was quick to state that:

“This Court in the DAVID NJOROGE MACHARIA case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense incases where substantial injustice might otherwise result’ and to include ***all situations where an accused person is charged with an offence whose penalty is death.*** **This may be misunderstood to mean that allpersons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is**

compromised in one way or another only then would the state obligation to provide legal representation arise.”

It would appear from the above, that for an accused person to qualify for legal representation under Article 50, it must be evident that such a person charged with a capital offence cannot afford legal representation and as a result his trial is compromised in one way or another. In the present case, the appellant was charged with the offence of robbery with violnce whose penalty is death. He was 18 years old and it is therefore very likely that he could not afford legal representation. It is obvious that due to lack of legal representation he pleaded guilty on the belief that he could be assisted once he pleaded guilty. We find that lack of legal representation greatly inhibited the appellant in his case. Based on the above, it is our considered finding that an order for retrial would be necessary .

The appeal is therefore allowed, the lower court order set aside and a fresh retrial ordered to be undertaken by a different magistrate of competent jurisdction.

Orders accordingly.

Dated, signed and delivered this 29th September, 2015

H. K. CHEMITEI

JUDGE

E. N. MAINA

JUDGE